10

Investment Facilitation and the Global Technology Sector

Intergovernmental Cooperation versus Geopolitical Rivalry

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10.1 Introduction

This chapter first examines some of the so-called push-and-pull factors that influence investment decisions in the global technology industry generally but also the digital economy specifically. In doing so, it seeks to provide some insights into what concrete steps policymakers could and should take over short to medium terms in order to increase the 'magnetism' of their own jurisdictions (cities, regions, countries, territories, or States) for attracting desirable forms of investment in technology and the digital economy. Here, the assumption is that the most desirable forms of such investment are those that bring with them well-paid and highly skilled jobs, create new sources of tax revenue for the host government(s), stimulate economic activity that does not cause environmental degradation, and finally helps the host economy to climb the chain of value creation and thereby better position itself to attract more such investment and economic activity in a self-reinforcing virtuous circle.[1]

The chapter then turns to an analysis of several intergovernmental initiatives on investment policymaking that seek, either explicitly or implicitly, to address the needs of the global technology industry with respect to one or several of the major investment constraints faced by it. The analysis finds that despite appearances to the contrary, there is a large degree of consensus among States of various ideological persuasions

[1] L. Adams, P. Régibeau, and K. Rockett, 'Incentives to Create Jobs: Regional Subsidies, National Trade Policy and Foreign Direct Investment' (2014) 11 *Journal of Public Economics* 102–119.

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and governance models on the optimal conditions or the minimum degree of regulatory certainty (technology) firms and investors can and should be able to expect from host governments. For the most part, this consensus has already been articulated in different forms and fora, including the G20, the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization (WTO), and investment chapters in various free trade agreements (FTAs). However, it is equally true that for the most part (i.e., outside the WTO and FTAs), this consensus exists in the absence of binding enforcement mechanisms. This is because governments have consistently insisted upon preserving for themselves considerable policy space in areas which they deem to be important to their regulatory autonomy and future economic viability, particularly in the area of interest here, namely, technology and the digital economy.

The chapter concludes that despite the deterioration in trust between major economic powers that have taken place over the last half-decade or so at the geopolitical level, incremental but potentially important progress continues to be made on improving the regulatory governance that underpins countries' investment environments. This is happening both at the WTO in the context of the Investment Facilitation for Development (IFD) Agreement and in the context of bilateral, regional, and megaregional FTAs that articulate important commitments both within their dedicated investment chapters and elsewhere.

10.2 Pull Factors for Technology Investors and Digital Economy Firms

There are a number of policy choices that governments can take to make their jurisdictions more attractive to investment from actors in the global technology industry or the digital economy. Noteworthy here and explored in more detail in Section 10.3 of this chapter is that many of these policy choices already enjoy a strong degree of consensus among a large number of governments, despite a strong degree of heterogeneity in terms of these countries' respective political ideologies, the quality of legislative and regulatory governance, and very different levels of economic development.

10.2.1 Market Openness

Most governments actively seek foreign direct investment in sectors like infrastructure, real estate development, and other areas where they face

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almost unlimited wants but limited fiscal means. Many governments have also realized the potential inherent to the technology industry and the digital economy to create large numbers of well-paid jobs and are keen to attract investment into these sectors for this very reason. This usually implies that the openness of investment markets in the technology and digital sectors tends to be a given. This will not be true, however where calls for an open investment regime are confronted by a similarly important set of policy imperatives in the form of national security or strategic industrial policy. Indeed, as this chapter lays out in more detail later, those constraints that persist and that have even been on the rise recently with respect to investment openness in the technology and digital sectors are almost invariably justified by virtue of either or both of these two higher-order policy considerations.[2]

Where countries wish to signal the openness of their investment markets, they have several ways of doing this. One way for WTO members is to make commensurate commitments under mode 3 market access in their respective schedule of specific commitments of the General Agreement on Trade in Services (GATS). This is because mode 3 is just a technical term for commercial presence, otherwise understood as the ability of service providers to reach customers in foreign markets by setting up a local office or subsidiary there. Much of the value creation that pervades the digital economy resides in the provision of services.[3] Another way for governments to signal open markets to foreign investors is to make market access commitments in either bilateral investment treaties or in the investment chapters of free trade agreements.

One important aspect of signaling investment market openness is to limit the incidence or alleviate the burden of investment screening mechanisms. This chapter discusses in some detail the increasing use of investment screening mechanisms made by several governments in the technology and digital sectors, which, when combined with other measures, have led to a sudden and significant reversal of investment flows from China to the United States and the European Union (see Section 10.3.2). Apart from raising the level of uncertainty for a given transaction, investment screening mechanisms also raise costs and expose a

[2] J. B. Heath, 'The New National Security Challenge to the Economic Order' (2020) 129 *The Yale Law Journal* 1020–1098.

[3] R. Bukht and R. Heeks, 'Defining, Conceptualising and Measuring the Digital Economy', Development Informatics Working Paper No. 68, 3 August 2017, online at: http://dx.doi.org/10.2139/ssrn.3431732 (last accessed 13 June 2023).

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potential investor to invasive and often unwanted scrutiny. This is in addition to the negative publicity (reputational risk) that will inevitably ensue if a proposed transaction is blocked, thereby resulting in immediate and negative fallout on a company's share price.

The most common justification given by governments for both enacting investment screening mechanisms and using them to prevent the consummation of specific transactions is national security concerns. This particular policy rationale is favored for various reasons, but arguably the most important is the perceived freedom from judicial scrutiny that invoking national security affords governments.[4] Indeed, the limits of what governments can and cannot do in order to defend their own national security interests is something that there is currently little to no international consensus on. In fact, it is probably fair to say that the only consensus that seems to be emerging on this issue is that no government is willing to abide any form of constraint in defining the limits of its regulatory sovereignty when defending what it perceives to be the national interest.[5]

10.2.2 Nondiscrimination

Nondiscrimination in the context of foreign investment is best understood as treating all investors equally in all areas of law and regulation, irrespective of their country of origin.[6] This has important implications for foreign investors, both in terms of procedural fairness as well as their ability to contest markets on a level playing field vis-à-vis other firms (both domestic and foreign). The underlying logic here is that it is simply not fair to apply laws more restrictively or make regulatory requirements tougher for foreign firms. In fact, doing so is very likely to skewer market outcomes in favor of a set of privileged firms that may simply not be as efficient as their foreign competitors. One important way that governments can implement this policy objective is by removing any reference to nationality or country of origin in the laws and regulations that govern both investment and different economic sectors and by ensuring that

[4] D. Amoroso, 'A Fresh Look at the Issue of Non-Justiciability of Defence and Foreign Affairs' (2010) 23 *Leiden Journal of International Law* 933–948.

[5] Heath, 'The New National Security Challenge to the Economic Order'.

[6] N. F Diebold, 'Standards of Non-Discrimination in International Economic Law' (2011) 60 *International and Comparative Law Quarterly* 831–865.

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these laws and regulations are implemented evenly without favoring the interests of one group of actors over those of another.

Nondiscrimination for foreign investors is something on which there is really only an international consensus in principle since many governments continue to make nationality or country of origin a determinative factor in what companies are allowed to do in their economies and how the law is to be applied to them. This is permissible since – as shall be discussed in more detail later – many of the international initiatives to establish common standards on the treatment of foreign investors (and that explicitly mention nondiscrimination) are best endeavor frameworks that do not bestow obligations on sovereign governments or actionable rights on foreign investors. In the context of investment chapters in FTAs, countries get around strict adherence to nondiscrimination by explicitly scheduling any nonconforming measures that violate this principle (UNCTAD, 2006).[7]

10.2.3 Sound Regulatory Governance

Sound regulatory governance has an inordinately important impact on the predictability of doing business in a country. Most business owners and investors prefer predictability because it allows them to engage in medium- to long-term planning and thus to optimize costs. Unpredictability essentially impedes proper planning, and in doing so raises exposure to increased costs. Sound regulatory governance manifests itself in a number of ways, such as by notice and comment procedures for the enactment of new laws and regulations, particularly when these are likely to impact sectors where foreign investors are present. Another indicator of sound regulatory governance is proportionality of regulatory interventions, meaning that regulators intervene following a careful weighing and balancing of the interests at stake through regulatory impact assessments.[8]

These kinds of imperatives are starting to find expression in multilateral instruments on trade and investment, such as in the G20 Guiding Principles for Global Investment Policy Making, the UNCTAD

[7] UNCTAD, 'Preserving Flexibility in IIAs: The Use of Reservations' (New York : UNCTAD, 2006), online at: https://unctad.org/system/files/official-document/iteiit20058_en.pdf (last accessed 13 June 2023).

[8] C. H. Kirkpatrick and D. Parker (eds.), *Regulatory Impact Assessment: Towards Better Regulation* (Cheltenham: Edward Elgar Publishing, 2007).

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Investment Policy Framework for Sustainable Development, and proposals for a draft agreement in the context of structured discussions currently ongoing at the WTO on Investment Facilitation for Development (all discussed in more detail in Section 10.4). This indicates a high degree of consensus in principle on this issue. However, making genuine improvements in the area of regulatory governance is a slow and difficult process since it goes right to the heart of a country's underlying political–economy power structures. International agreements can be supportive of this process, but what is really needed here is strong political leadership.[9]

10.2.4 Enabling Legislative Environment

A number of areas of the law are of general concern to foreign investors and of strategic importance to investment in the technology sector and the digital economy more specifically. One is intellectual property. Governments that want to attract investment, particularly foreign investment, into sectors that rely on research and innovation need to ensure adequate protection of intellectual property rights, both as a matter of formal law and in terms of their enforcement. When Singapore made the decision to become a global center of innovation in biotechnology, one of the first flanking policies it needed to implement was a tangible upgrading of its intellectual property laws.[10] Of course, countries also want to ensure that they can move up the value chain so that when they invite foreign firms into their markets, they want to encourage technology transfer. This needs to be done in a way that does not represent coercion and so that foreign firms feel they are not being strong-armed into giving up their most precious and cutting-edge intellectual property. Research seems to demonstrate that the right regulatory balance governments need to strike in the area of protection of intellectual property rights is one that is not too strict and not too lax, a kind of 'Goldilocks ideal' that allows new and innovative business models to thrive but also offers an effective level of protection to those who do invest significant resources to develop their own IP.[11]

[9] S. Shapiro and D. Borie-Holtz (eds.), *The Politics of Regulatory Reform* (New York: Routledge, 2014).

[10] W. Y. Liew, 'Intellectual Property Rights', in T. Koh and L. L. Chang (eds.), *The United States – Singapore Free Trade Agreement: Highlights and Insights* (Singapore: World Scientific, 2004), at 123–134.

[11] M. F. Ferracane, H. Lee-Makiyama, and E. van der Marel, *Digital Trade Restrictiveness Index* (Brussels: European Center for International Political Economy, 2018), online at:

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Another important area of legislation that is of overriding importance to investors, but particularly to investors in the technology and digital sectors, consists of regulation of labor markets. This is largely because of the important role that skills and technical expertise play in these sectors. Governments wishing to attract investors or firms in these sectors need to either ensure that a sufficiently deep and broad pool of labor with these skills is already on hand or can be easily 'imported'. Such labor market regulation often involves targeted policy interventions to create such labor pools (which can admittedly take decades), or a certain international openness and flexibility with respect to skilled labor mobility. Furthermore, the flexibility and openness that should characterize labor markets wishing to attract investment and firms in the technology and digital sectors cannot be limited only to technical professions and skills but must also extend to senior management. Firms in these sectors want the regulatory freedom of action to staff senior management roles, and domestic labor law requirements must be flexible and open enough to permit this. This imperative has already found expression in a number of bilateral investment treaties and FTA chapters on investment discussed in more detail under Section 10.4.3.

10.3 Push Factors Dissuading Investment by Technology and Digital Firms

This next section examines a number of the investment barriers faced by firms in the technology sector and the digital economy. In doing so, it focuses on the three most prevalent forms of investment restrictions impacting these sectors. The first of these comprise outright bans on foreign investment into predefined sectors of economic activity. The second are investment screening procedures (already alluded to earlier) that seek to determine whether a planned investment poses a threat to national security or any other strategic interest. The third are measures that significantly impact companies' freedom of action once they have been allowed to enter a market.

10.3.1 Closed-Door Investment Regimes

Many countries set strict limits on foreign investment into their technology sectors or into other areas of the digital economy, whereas other

https://ecipe.org/wp-content/uploads/2018/05/DTRI_FINAL.pdf (last accessed 13 June 2023).

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countries preclude such investment outright. To name just one example, Canada maintains what the United States has characterized as 'one of the most restrictive telecommunication regimes among developed countries' because of limits on foreign ownership of certain existing suppliers of facilities-based telecommunications services and a requirement that at least 80 percent of board members must be Canadian citizens.[12] Closed-door or highly restrictive investment regimes run contrary to the principle of market openness, which many countries, including Canada, openly espouse in their commitment to international guidelines such as those developed by the G20 and UNCTAD and policy frameworks such as those elaborated by the OECD (all discussed in more detail earlier). However, investment market openness (like free trade) is not an absolute principle, but rather one that is relativized by other overarching considerations and policy priorities. For example, in justifying its closed investment regime in telecommunications, Canada invokes national security concerns and access to essential critical communications infrastructure. Furthermore, the guidelines and frameworks developed by the G20, UNCTAD, and the OECD are not intended to be binding treaty instruments that would engage state responsibility in the event of noncompliance. Even treaty commitments under WTO agreements or FTAs provide sufficient flexibilities (referred to as 'policy space') that allow governments to reserve and essentially carve out entire sectors from liberalization commitments such as an open-door investment regime.

10.3.2 Investment Screening Procedures

The history and evolution of investment screening procedures have been covered in great detail elsewhere.[13] Suffice to say here that in recent history, this has been the investment restriction of choice for governments seeking to prevent the acquisition of domestic technologies or

[12] United States Trade Representative (USTR), '2019 National Trade Estimates Report on Foreign Trade Barriers', (2019), online at: https://ustr.gov/sites/default/files/2019_National_Trade_Estimate_Report.pdf (last accessed 13 June 2023).

[13] H. Chang, 'Regulation of Foreign Investment in Historical Perspective', No 2003-12, United Nations University (UNU) Institute for New Technologies (INTECH) Discussion Paper Series, December 2003, online at: https://econpapers.repec.org/paper/unmunuint/200312.htm (last accessed 13 June 2023); G. Dimitropoulos, 'National Security: The Role of Investment Screening Mechanisms', in J. Chaisse, L. Choukroune, and S. Jusoh (eds.), *Handbook of International Investment Law and Policy* (Singapore: Springer, 2020), at 507–543.

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other critical assets, particularly against investment from China.[14] The United States, as one of the most technologically advanced countries, with a handful of some of the most dominant companies in the digital economy, has arguably been at the forefront of establishing investment screening mechanisms as well as tightening their application to make them more surgically targeted at investments from its biggest emerging geopolitical rival, China.[15] In August 2018, then President Trump signed into law the Foreign Investment Risk Review Modernization Act (FIRRMA), in response to widespread concerns about the risks faced by United States' technology companies primarily from FDI emanating from China. In addition to a number of procedural amendments, FIRRMA increased the scope of review powers of the Committee on Foreign Investment in the United States (CIFIUS) to include any non-controlling investment in United States' businesses involved in critical technology, critical infrastructure, or collecting sensitive data on United States' citizens (Jackson, 2020).[16] This was part of a wider pushback against encroaching Chinese technological leadership that included an investigation into Chinese practices in the area of forced technology transfer and a concerted campaign against Chinese technology leaders such as Huawei and TikTok.

The European Union has also felt compelled to act in the face of massive FDI inflows from China and acquisitions by Chinese buyers that peaked in 2016 and set off alarm bells as well as a great deal of introspection as to how open Europe should be to investment from third countries across many strategic sectors. This introspection was deemed all the more important since China itself maintains strict controls on inbound investment to a long list of sectors, both strategic and otherwise. This culminated in a number of countries introducing new or tightening existing investment screening measures, whereas at the EU level, a new investment screening mechanism that had first been touted in

[14] Z. T. Chan and S. Meunier, 'Behind the Screen: Understanding National Support for a Foreign Investment Screening Mechanism in the European Union' (2022) 17 *The Review of International Organizations* 513–541.

[15] M. A. Carrai, 'The Rise of Screening Mechanisms in the Global North: Weaponizing the Law against China's Weaponized Investments?' (2020) 8 *The Chinese Journal of Comparative Law* 351–383.

[16] J. K. Jackson, 'The Committee on Foreign Investment in the United States', Congressional Research Service, 14 February 2020, online at: https://sgp.fas.org/crs/natsec/RL33388.pdf (last accessed 13 June 2023).

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2017 entered into force in April 2019.[17] The underlying intent in adopting this framework was perhaps best summed up by Jean-Claude Juncker, President of the European Commission, in his 2017 State of the Union Address, in which he called for reciprocity in the EU's trading relations, saying 'we have to get what we give', and also emphatically stated, 'Let me say once and for all: we are not naïve free traders. Europe must always defend its strategic interests'.[18]

10.3.3 Regulatory Constraints

Regulatory constraints come in many shapes and sizes, with various forms and functions. This chapter discusses three that have arguably the most far-reaching implications for the global technology sector and digital economy firms, namely, forced data localization (a relatively new problem), local content requirements (an old problem), and forced technology transfer (an old practice that recently became a problem).

Forced data localization requirements mandate that companies that collect, store, and process data on their customers do so within a confined territorial jurisdiction, usually the country or territory imposing the requirement. An increasing number of countries are resorting to these kinds of policies, for a range of different stated policy reasons. This is encountering considerable pushback from the global technology industry, which argues these measures do very little to achieve the purported objectives governments claim to be pursuing when enacting and enforcing them.[19] India (like many other countries) makes frequent use of data localization requirements in different sectors. For example, in the online payments sector, the Reserve Bank of India enacted legislation in October 2018 requiring all payment service suppliers to store all information related to electronic payments by Indian citizens on servers located in India.[20]

[17] European Commission, 'EU Foreign Investment Screening Regulation Enters into Force', 10 April 2019, online at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2088 (last accessed 13 June 2023).

[18] European Commission, 'President Jean-Claude Juncker's State of the Union Address 2017', 13 September 2017, online at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165 (last accessed 13 June 2023).

[19] C. Ankeny, 'The Costs of Data Localization', ITI TechWonk Blog, 17 August 2016, online at: www.itic.org/news-events/techwonk-blog/the-costs-of-data-localization (last accessed 13 June 2023).

[20] USTR, '2019 National Trade Estimates Report on Foreign Trade Barriers'.

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Although much has been made of the negative impact of data localization requirements on raising costs across the industry,[21] it is equally true that these and other data sovereignty policies are an important factor driving a wave of increased investment into the construction of new data centers, together with other significant structural trends that are likewise driving this growth.[22] In addition to this, there is also an important body of research that cites the contribution that geographically proximate data centers can have on lowering latency and thus improving user experiences and sales across a broad array of applications and scenarios.[23] However, the cost–benefits analysis plays out, as investors and digital economy firms generally want or need to have the regulatory freedom of action to be able to decide what the best business solution is for either localizing data or transferring it abroad. Particularly the growth in importance of cloud computing services for enabling companies not only to save on data storage costs but also to avail themselves of a wide range of important digital technologies that are offered in the cloud means that data localization requirements are almost inevitably going to diminish the value of a given investment or raise the costs of investing in a jurisdiction that imposes them.

By the same token, local content requirements are seen by investors and digital firms as just another way host governments artificially and unnecessarily drive up compliance costs.[24] Local content requirements can also give rise to severe business continuity problems since complying with them can be either economically infeasible or practically impossible. This is what has been happening over the last few years in Indonesia, where all 4G-LTE-enabled devices have been required to contain a minimum of 30 percent local content, and all 4G-LTE base stations have

[21] M. Bauer, H. Lee-Makiyama, E. van der Marel, and B. Verschelde, 'The Costs of Data Localization: Friendly Fire on Economic Recovery', ECIPE Occasional Papers, No. 3/2014, online at: https://ecipe.org/wp-content/uploads/2014/12/OCC32014__1.pdf (last accessed 13 June 2023).

[22] A. J. Byers, *The International Data Center Development Boom*, Capacity Media, 16 September 2020, online at: www.capacitymedia.com/articles/3826346/the-international-data-center-development-boom (last accessed 13 June 2023).

[23] Z. Imran, 'How Server Location Affects Latency?', Cloudways Blog, 9 December 2021, online at: www.cloudways.com/blog/how-server-location-affects-latency/ (last accessed 13 June 2023).

[24] S. Ezell and N. Cory, 'The Way Forward for Intellectual Property Internationally', Information Technology and Innovation Foundation (ITIF), 25 April 2019, online at: https://itif.org/publications/2019/04/25/way-forward-intellectual-property-internationally (last accessed 13 June 2023).

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likewise been required to contain at least 40 percent local content. In order to meet these thresholds, companies importing these products must demonstrate local manufacturing, design, or development; the production of software applications; or investment commitments.[25] In order to meet these requirements, Apple announced in 2017 that it would be opening an innovation center in Jakarta, and in 2018, it effectively opened a developer academy to purportedly 'train the next generation of app developers on the world's most advanced mobile operating system'.[26] Samsung, for its part, opened a factory for the 'production' (meaning here assembly) of smartphones in Jakarta in 2015.[27]

It has been argued that forced technology transfer is something of a misnomer since companies choose to transfer technology in exchange for some form of consideration, usually market access. The country that comes in for some of the most wide-scale and vocal criticism with respect to forced technology transfer is China. The United States, who has long been the most active country in seeking to improve the protection and enforcement of IP in China more generally,[28] took a more litigious approach in 2017 by launching a Section 301 investigation against Chinese policies and practices in the area of forced technology transfer. This investigation culminated in a set of reports published the following year expressing a number of grievances against China's alleged practices in this area.[29] Indeed, it was these reports that then President Trump

[25] Global Trade Alert, 'Indonesia: Local Content Requirements for Smartphones & Tablets', 1 January 2017, online at: www.globaltradealert.org/intervention/19584/local-sourcing/indonesia-local-content-requirements-for-smartphones-tablets (last accessed 13 June 2023).

[26] Apple Newsroom, 'Apple Opens Developer Academy in Indonesia', 7 May 2018, online at: www.apple.com/sg/newsroom/2018/05/apple-opens-developer-academy-in-indonesia/ (last accessed 13 June 2023).

[27] L. Yulisman, 'Samsung Opens Cell-Phone Factory in Indonesia', The Jakarta Post, 11 February, 2015, online at: www.thejakartapost.com/news/2015/02/11/samsung-opens-cell-phone-factory-indonesia.html (last accessed 13 June 2023).

[28] A. C. Mertha (ed.), *The Politics of Piracy: Intellectual Property in Contemporary China* (New York: Cornell University Press, 2005).

[29] USTR, 'Findings of the Investigation into China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property and Innovation under Section 301 of the Trade Act of 1994', 22 March 2018, online at: https://ustr.gov/sites/default/files/Sectionpercent20301percent20FINAL.PDF (last accessed 13 June 2023); USTR, 'Update Concerning China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation', 20 November 2018, online at: https://ustr.gov/sites/default/files/enforcement/301Investigations/301percent20Reportpercent20Update.pdf (last accessed 13 June 2023).

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used as the justification for the unilateral imposition of punitive tariffs, which started a trade war between the two countries and were also found to be WTO noncompliant some two years later by a WTO dispute settlement panel.[30]

The EU, for its part, has also sought to challenge the alleged widespread nature of forced technology transfer in China by launching a WTO case targeting these practices.[31] In its request for consultations, the EU alleges that China's measures violate a number of its commitments under the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs). One specific allegation the EU makes in this context is that 'China limits the rights of foreign patent holders to assign or transfer by succession patents and to conclude licensing contracts, contrary to its obligations under Article 28.2 of the TRIPs Agreement' and that '[because] of these restrictions, China also fails to ensure effective protection for foreign intellectual property rights holders of undisclosed information contrary to its obligations under Article 39.1 and 39.2 of the TRIPs Agreement'.[32] For the global technology industry, the approaches taken by the United States and the EU are arguably a piece of geopolitical theatre or big-power posturing. Companies with proprietary technologies doing business in China have long appreciated the risk–reward calculus that underpins these kinds of business and investment decisions. They adopt various strategies to either safeguard their most sensitive secrets or conclude that, because technology is based on something as immaterial as information, knowledge, and skills, it is only a question of time before these factors become widely known and adopted by partner firms that may one day become competitors. Instead, technology firms reason that they must therefore maintain their edge by the superiority of their value proposition and the quality of their management practices more generally.[33]

[30] WTO, *United States – Tariff Measures on Certain Goods from China* [DS543].

[31] WTO, *China – Certain Measures on the Transfer of Technology* [DS549], online at: https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157591.12.20percent20-percent20REVpercent20consultationpercent20requestpercent20FINAL.pdf (last accessed 13 June 2023).

[32] See *China – Certain Measures on the Transfer of Technology* [DS549], 'Request for Consultation by the European Union', WT/DS549/1/Rev.1, G/L/1244/Rev.1, IP/D/39/Rev.1, 8 January 2019, at 8, online at: https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157591.12.20percent20-percent20REVpercent20consultationpercent20requestpercent20FINAL.pdf (last accessed 13 June 2023).

[33] M. Dunne, *American Wheels on Chinese Roads: The Story of General Motors in China* (Singapore: Wiley, 2011); J. R. Immelt, *Hot Seat: What I Learned Leading a Great American Company* (New York: Simon & Schuster, 2021).

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10.4 International Cooperation on Investment Policy

This section analyzes a number of different international initiatives aimed at adopting disciplines on investment that, although not targeted at investment in the technology sector or digital economy specifically, are nevertheless well equipped to significantly reduce investment barriers and freedom-of-action constraints on technology firms and digital actors that engage in cross-border FDI. These initiatives are taking place in *fora* such as the G20, the OECD, UNCTAD, and the WTO, as well as under bilateral and regional free trade agreements. This analysis takes place under three distinct pillars. The first pillar examines those initiatives that do not seek to enact or impose binding obligations on participating States (i.e., best endeavor initiatives). Under the next pillar, Part IV examines and discusses those provisions under WTO law that effectively seek to place binding constraints on what governments can and cannot do in terms of investment policy, including new rules currently being negotiated under a potential WTO Investment Facilitation for Development Agreement. The third pillar of this analysis examines what common threads can be identified in investment chapters in different free trade agreements, particularly the post-NAFTA FTA landscape.

10.4.1 Best Endeavor Initiatives at the G20, OECD, and UNCTAD

The initiatives concluded under the G20, the OECD, and UNCTAD all represent nonbinding, best endeavor frameworks that arguably do little to effectively constrain governments but that nevertheless lay out a set of common understandings in principle. Although the lack of an effective enforcement mechanism for these frameworks may limit their ability to constrain government intervention and as such likewise limit their usefulness for firms seeking greater predictability and security, this should not detract from the fact that they can serve a useful signaling purpose in terms of identifying where consensus is (or rather was) starting to emerge on what principles, rules, and limits should apply to regulating foreign investment and the space this affords investors in the technology sector and the digital economy.

The G20 Guiding Principles for Global Investment Policymaking are the culmination of an ambitious push, spearheaded by the Chinese government during its presidency of the G20 in 2016. They articulate a consensus on where policymaking should be headed as the interests of developed and developing countries start to converge now that they have

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each become both the source and the destination of increasing flows of foreign direct investment. The G20 Guiding Principles represent a fairly universally held consensus on a set of landing zones or lowest-common denominator benchmarks from which to start more ambitious negotiations in other *fora*, particularly the WTO Investment Facilitation talks – likewise discussed in more detail here. In terms of their substantive contribution to investment conditions for the global technology industry and digital economy firms, the Principles affirm the need to avoid protectionism and to have an open, nondiscriminatory, and predictable investment environment. In addition to this, the affirmation of the importance of legal certainty and strong protection for investors and investment, and of the desirability of stakeholder participation when developing new regulations that impact investment are equally welcome as statements of principle on raising the quality of regulatory governance generally. The Principles essentially demonstrate that governments in G20 countries have realized what investors need (market access, a level playing field and regulatory predictability) and their willingness to acknowledge this by embodying this realization in the context of an international declaration arguably provides some important signaling. At least this was the situation in 2016, before both the Trump presidency and the COVID-19 pandemic. The lack of congruity between the aspirations expressed in the Guiding Principles and the many investment policy measures taken by G20 countries since then are enough to give one considerable pause in pondering the value of such political declarations.[34]

The OECD Policy Framework for Investment represents a more consensus-based and constructive peer-review approach that was ultimately adopted in the wake of the failure of OECD members to negotiate a Multilateral Agreement on Investment (MAI) in 1998.[35] Its focus is on providing recommendations – following voluntary reviews – to governments on how they can improve the investment climate in their respective countries. This approach, initially dubbed the Policy Framework for Investment, was first launched in 2006, with its methodology updated in

[34] S. J. Evenett, 'What Caused the Resurgence in FDI Screening?', The European Money and Finance Forum (SUERF), May 2021, online at: www.suerf.org/policynotes/24933/what-caused-the-resurgence-in-fdi-screening (last accessed 13 June 2023).

[35] R. Dattu, 'A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment' (2000) 24 *Fordham International Law Journal* 275–316.

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2015 to include investment policies conducive to supporting the Sustainable Development Goals (SDGs). Essentially the Framework asks policymakers to respond to a series of questions in various areas of policy and regulation that have a direct impact on the investment climate. These questions involve consensus issues such as nondiscrimination, minimizing the burden regulations imposed on investors, or striking the right balance of interests when fostering innovation and protecting intellectual property rights. This is a nonconfrontational and non-litigious way to encourage domestic reform in the area of investment policy since the incentives for the government under review and those conducting the review are aligned in a way that is fundamentally different than would be the case in the context of FTA negotiations or investor–state arbitration. By its very nature, the Framework compels host governments to think about the economic and efficiency implications of any shortcomings in their investment regimes, as identified during the review, and of ways in which the regulatory environment for investment can be improved.

The UNCTAD Policy Framework for Sustainable Development was launched in 2012 and represents one of many tools UNCTAD provides to policymakers in the area of investment, including country-specific investment policy reviews, of which more than fifty have been conducted since 1999. The Investment Policy Framework contains a set of principles that are nonbinding and somewhat light on prescriptive provisions that seek to set any kind of meaningful limits on governments' regulatory autonomy. That being said, the UNCTAD Principles do implicitly exhort governments to attain a high standard of investment governance, by, for example, stating that investment policies 'should be developed involving all stakeholders, and embedded in an institutional framework based on the rule of law that adheres to high standards of public governance and ensures predictable, efficient and transparent procedures for investors'.[36] The UNCTAD Principles also exhort governments to have open investment regimes, to provide adequate protection to investors, and to treat them without discrimination. Although Principle 5 recognizes governments' right to regulate, it does this in the absence of any exhortation to do so within the limits of proportionality or in a way that is minimally disruptive to the interests of established investors. Nevertheless, as a baseline for where consensus has already been achieved on sound

[36] UNCTAD, *Investment Policy Framework for Sustainable Development*, 2015, online at: www.tralac.org/images/docs/7733/unctad-investment-policy-framework-for-sustainable-development-2015-executive-summary.pdf (last accessed 13 June 2023).

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investment governance, the UNCTAD Principles are helpful, and future work to elaborate binding and actionable rules on investment can take the UNCTAD Principles as a starting point. This is arguably what is happening in the context of the talks currently taking place at the WTO on a potential WTO Agreement on Investment Facilitation for Development, discussed in more detail in the following text.

10.4.2 WTO Disciplines Present and Future

Contrary to the aspirational and best endeavor frameworks discussed in the previous section, this section focuses on the harder and more binding rules of the WTO as they relate to investment. The analysis begins with the WTO Agreement on Trade-Related Investment Measures (TRIMs), before moving on to the GATS, and culminates in an examination of recently initiated efforts to establish a new set of rules on investment facilitation.

The TRIMs Agreement was one of the three new issues introduced into the Uruguay Round on the insistence of the United States, the other two being trade in services – culminating in the GATS – and Trade-Related Intellectual Property Rights – culminating in the TRIPs Agreement.[37] Despite the original ambitions of the United States to negotiate an ambitious new agreement governing such measures, these ambitions were ultimately frustrated by the opposition of developing countries, led by Brazil and India.[38] Because of this resistance, the TRIMs Agreement we have today is essentially just a restatement of GATT disciplines on national treatment (GATT Article III) and quantitative restrictions (GATT Article IX) as applied to an illustrative list of trade-related investment measures set out in an Annex to the Agreement and as articulated in a 1980s GATT Panel involving a set of requirements under Canadian law subject to which foreign investors would be allowed to invest in Canada.[39] Despite its limitations, the TRIMs Agreement has had limited success in policing some of the most flagrant discriminatory investment-related measures, such as in the context of Indonesia's

[37] E. H. Preeg, *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System* (Chicago: University of Chicago Press, 1995).

[38] J. Croom, *Reshaping the World Trading System: A History of the Uruguay Round*, 2nd ed. (London: Kluwer Law International, 1998).

[39] M. L. D. Sterlini, 'The Agreement on Trade-Related Investment Measures', in P. F. J. Macrory, A. E. Appleton, and M. G. Plummer (eds.), *The World Trade Organization: Legal, Economic and Political Analysis*, (Boston: Springer, 2005), at 437–483.

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ill-fated plans to launch a national automotive industry,[40] although it has yet to be tested in the area of technology or the digital economy.

In contrast to the limited scope and applicability of the TRIMs Agreement, the WTO General Agreement on Trade in Services (GATS) and the mechanisms it creates for WTO members to undertake commitments with respect to mode 3 trade in services (provided through commercial presence) offer a considerable degree of regulatory certainty to investors. Provided their activities fall within the substantive scope of the GATS (i.e., they are services), foreign investors hailing from another WTO member can enjoy some degree of regulatory certainty in another WTO member by virtue of the general obligations that apply in the area of nondiscrimination and transparency. In addition to this, foreign investors can likewise rely on certain expectations with respect to market access, a level playing field, and domestic regulation when the host State (also a WTO member) has made commensurate (mode 3) commitments. Indeed, the obligations imposed on members with respect to domestic regulation, which recently were further clarified by WTO members under a new agreement, must be considered as an articulation of the principles of sound regulatory governance that enjoy a broad consensus within the meaning of the analysis of investment regimes being carried out here.

The WTO Joint Statement Initiative on Investment Facilitation for Development (IFD) is the culmination of many decades of efforts to increasingly codify, within the multilateral trading system, the obvious links that exist between trade and investment – links that even the architects of the abortive International Trade Organization (ITO) and its stillborn Charter were well aware of.[41] Although not formally endorsed as part of the Ministerial Declaration that was issued at the conclusion of the 11th Ministerial Conference in Buenos Aires, a sizeable group of seventy countries nevertheless issued a joint statement calling for the initiation of structured discussions with the aim of developing a multilateral framework on investment facilitation.[42] These talks are discussed in considerably more detail in other chapters of this volume; suffice to say here that at the time of writing, some 110 WTO members and thus two-thirds of the current membership are now participating in

[40] WTO, *Indonesia – Certain Measures Affecting the Automobile Industry* (DS 54).

[41] C. Wilcox, *A Charter for World Trade* (New York: MacMillan, 1949).

[42] See WTO, 'Joint Ministerial Statement on Investment Facilitation for Development', WT/MIN(17)/59, 13 December 2017, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=240870 (last accessed 13 June 2023).

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these talks, with a view to concluding a new WTO Agreement on Investment Facilitation for Development by the end of 2022.[43]

Based on the text proposals that were being discussed through the end of 2021, particularly the so-called Easter Text,[44] a number of tangible outcomes are beginning to take shape that, if enacted, would be likely to go some way in addressing the needs of the global technology industry and digital economy firms (as discussed in Section 10.1 of this chapter). This is true, for example, of the proposed new disciplines to boost transparency under Section II with respect to both current investment measures and proposed measures, with a corresponding notice and comment period. Textual proposals on streamlining and speeding up of administrative procedures (Section III) could also potentially go a long way in reducing the compliance burden and accelerating approvals when specific transactions are time-sensitive and need to be cleared quickly, something particularly important in the fast-moving technology sector. This Section of the draft agreement would also include due process provisions that can only make a positive contribution to the investment governance of many WTO members, if implemented.

Finally, worth mentioning in the context of the analysis being undertaken here are the proposed provisions contained in Section IV of the draft agreement, which taken together, aim to improve internal and cross-border administrative cooperation and regulatory coherence.[45] These provisions are again aimed at improving the quality of the domestic institutional landscape that foreign investors must navigate. By doing so, these provisions aim to reduce investors' exposure to arbitrary, discriminatory, and other regulatory interventions perpetrated or tolerated by the host government that either drastically undermine the value of these investments or tilt the playing field against them in a way that is prone to dramatically upset the calculus of risk and reward that these

[43] WTO, 'Investment Facilitation Negotiations End Productive Year, Aim at Conclusion by End 2022', 24 November 2021, online at: www.wto.org/english/news_e/news21_e/infac_24nov21_e.htm (last accessed 13 June 2023).

[44] WTO, 'More Than Two-Thirds of WTO Membership Now Part of Investment Facilitation Negotiations', 30 November 2021, online at: www.wto.org/english/news_e/news21_e/infac_01dec21_e.htm (last accessed 13 June 2023).

[45] Draft Article 19.1 of the 2019 investment facilitation text notes that "regulatory coherence refers to the use of good regulatory practices in the process of planning, designing, issuing, implementing and reviewing regulatory measures in order to facilitate achievement of policy objectives, and to enhance regulatory cooperation in order to further those objectives and promote international trade and investment, economic growth and employment.", which borrows heavily from Article 25.2 of the CPTPP.

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investments were predicated on in the first place. In doing so, the structured dialogue on investment facilitation for development appears to be bringing the WTO incrementally closer to the objectives sought under the OECD Investment Policy Framework with respect to the quality investment regimes, economic governance, and rule of law outcomes that the latter seeks to promote.

10.4.3 Investment Chapters in Free Trade Agreements

This next and final section on international cooperation in investment examines what has transpired in the context of free trade agreements. It begins with a brief discussion of the historical antecedents of investment provisions in the context of broader treaty arrangements primarily focused on international trade. The discussion then moves on to the modern era, particularly when this trend really took off, namely, in the context of the North American Free Trade Agreement (NAFTA). The investment provisions of NAFTA have served as a template for many subsequent trade agreements both between the United States and its FTA partners and beyond, culminating in the first and most recent update of this agreement, the United States–Mexico–Canada Agreement (USMCA).

Investment was included in the abortive ITO Charter, negotiated as part of the postwar international economic architecture, and even then – as now – was closely linked to the issue of economic development.[46] The investment provisions of the ITO Charter were focused more on guaranteeing foreign investors most-favored-nation (MFN), and national treatment, as well as providing protection to them against 'unreasonable or unjustified action [. . .] injurious to the rights or interests of national of other Members . . .'.[47] Thus, in no small way, these provisions resembled those that were then being sought under different treaties of friendship, commerce, and navigation and later under bilateral investment treaties, and as well as in the investment chapters of FTAs.[48]

[46] W. Adams Brown, Jr., *The United States and the Restoration of World Trade* (Washington, DC: The Brookings Institution, 1950).

[47] See Article 11 (Means of Promoting Economic Development and Reconstruction) as well as Article 12 (International Investment for Economic Development and Reconstruction) of the Havana Charter for an International Trade Organization, online at: www.wto.org/english/docs_e/legal_e/havana_e.pdf (last accessed 22 December 2022).

[48] K. J. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce and Navigation Treaties* (New York: Oxford University Press, 2017).

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The current explosion in the negotiation of bilateral and regional free trade agreements arguably started in 1985 with the FTA between the United States and Israel, followed shortly thereafter by the 1987 FTA between Canada and the United States, which was itself followed by NAFTA in 1993. All subsequent FTAs that have been negotiated between the United States and its trading partners, including the 2018 USMCA and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP; which the United States ultimately withdrew from), have included provisions in their investment chapters largely predicated on the template that first emerged as NAFTA Chapter 11-Investment.[49] In fact the set of standards or minimum base lines that started to emerge in NAFTA (discussed in more detail later) have also become the norm (with slight deviations and carve-outs) for the European Union and even in FTAs negotiated by large middle-income developing countries such as China, Indonesia, and India.

What one finds in NAFTA and the many FTAs that have followed this template since are a core set of provisions that seek to place material constraints on host governments' regulatory autonomy, albeit subject to various different scope limitations, carve-outs, and exceptions. The first of these concern nondiscrimination, usually with provisions on both national treatment and MFN.[50] The second set of provisions seek to guarantee a minimum standard of treatment for foreign investors and their investments 'in accordance with international law, including fair and equitable treatment and full protection and security'.[51] The third set of provisions concern performance requirements and seek to stop host governments from setting minimum export requirements, or local

[49] M. A. Cameron and B. W. Tomlin, *The Making of NAFTA: How the Deal Was Done* (New York: Cornell University Press, 2001); F. Fontanelli and G. Bianco, 'Converging towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States' (2014) 50 *Stanford Journal of International Law* 211–245.

[50] See, e.g., the corresponding provisions in the 2019 Australian Indonesian CEPA, namely Article 14.4: National Treatment and Article 14.5: Most-Favoured Nation Treatment.

[51] See, e.g., NAFTA Article 1105. What this standard means in practice was elaborated by a NAFTA Tribunal in NAFTA Tribunal in *Glamis Gold*, namely: "to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1)." See *Glamis Gold Ltd. v. United States of America*, Award, 8 June 2009, para. 616, online at: https://jusmundi.com/en/document/pdf/Decision/IDS-100-1339683028-1476329508/en/en-glamis-gold-ltd-v-united-states-of-america-award-monday-8th-june-2009 (last accessed 13 June 2023).

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content requirements, or technology transfer requirements or other policies that seriously constrain foreign investors or their investments from making decisions on sourcing and distribution on the basis of purely commercial considerations.[52] Yet another set of provisions concern expropriation, so that host governments refrain from doing this unless under specific circumstances, such as in pursuit of a public purpose, under due process of law, on a nondiscriminatory basis, and subject to 'payment of prompt, adequate and effective compensation'.[53] Yet another set of provisions concern the ability of foreign investors to expatriate earnings, profits, and other proceeds or payments back to their home country.[54] Another set of provisions concern senior management and boards of directors and seek to constrain the ability of host governments to prevent foreign investors and their investments from appointing their own senior management personnel or running the executive organs of their corporate bodies in a way that allows them to retain effective control of these organs.[55] Finally, these chapters tend to include detailed provisions on dispute settlement that provide either for third-party investment arbitration or in the case of the Canada–EU Comprehensive Economic and Trade Agreement (CETA), referral to the Tribunal established under the auspices of the agreement itself.[56]

As NAFTA was superseded by the Agreement between the United States of America, the United Mexican States, and Canada (USMCA) – which entered into force on July 1, 2020 – some commentators have highlighted what they interpret as a weakening of the protection provided under the new rules.[57] Yet another important set of limitations in terms of the protection afforded to investors under the investment

[52] See, e.g., Article 10.5 (Performance Requirements) of the India – South Korea CEPA.
[53] See by way of example Article 8.12 of the Canadian – EU CETA.
[54] See, e.g., Article 15 (Transfers) of the Investment Chapter (Chapter 8) of the 2003 Singapore – Australia FTA, online at: www.dfat.gov.au/sites/default/files/safta-chapter-8-171201.pdf (last accessed 13 June 2023).
[55] See for example NAFTA Article 1107.
[56] Particularly Article 8.27.
[57] A. G. FitzGerald, M. J. Valasek, and J. A. de Jong, *Major Changes for Investor-State Dispute Settlement in New United States-Mexico–Canada Agreement*, Norton Rose Fulbright, October 2018, online at: www.nortonrosefulbright.com/en/knowledge/publications/91d41adf/major-changes-for-investor-state-dispute-settlement-in-new-united-states-mexico-canada-agreement (last accessed 13 June 2023). This in particular with regards to enforcement, as Canada chose to withdraw from the ISDS arrangements altogether, whereas the United States and Mexico chose to strictly limit the option of invoking ISDS (except with respect to a narrow cohort of highly regulated sectors – oil and gas, power, telecommunications) to claims of violation of national treatment, MFN or direct

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chapters of FTAs vis-à-vis the regulatory autonomy granted the authorities of host States come through the introduction in the USMCA of limiting language citing 'legitimate public welfare objectives' in the context of the two core nondiscrimination provisions (14.4 on National Treatment and 14.5 on MFN), which will attenuate any 'like circumstances' analysis made in the application of these provisions. The effective impact of this change remains to be seen, but what it says about where governments increasingly see the balance between the rights of investors and governments' right to regulate is significant.[58]

Despite the limited rolling back seen in the domain of investment protection, USMCA did nevertheless set a series of new and important regulatory constraints that do far more for the global technology sector and digital economy firms than anything previously negotiated.[59] For example, a comparison of the USMCA and corresponding CPTPP provisions on cross-border data flows (Article 14.11 of the CPTPP and Article 19.11 of the USMCA, respectively) shows that they both contain the same substantive obligations. Each sets forth a general ban on restrictions on cross-border data flows made in the course of business. However, this ban is caveated by a public policy exception, which is limited to interventions that are 'not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade'. Moreover, these interventions must adhere to abide by the principle of proportionality (i.e., 'not impose restrictions on transfers of information greater than are required to achieve the [legitimate public policy] objective [in question]'). However, the corresponding article in the USMCA goes slightly further, in that a footnote to it clarifies that 'a measure does not meet the conditions of this paragraph if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition to the detriment of service

expropriation, to the exclusion of other more commonly cited claims such as fair and equitable treatment and indirect expropriation.

58 D. Gaukrodger, 'The Balance between Investor Protection and the Right to Regulate in Investment Treaties: A Scoping Paper', OECD Working Papers on International Investment 2017/02, 24 February 2017, online at: www.oecd-ilibrary.org/finance-and-investment/the-balance-between-investor-protection-and-the-right-to-regulate-in-investment-treaties_82786801-en (last accessed 13 June 2023).

59 Business Software Alliance (BSA), 'Digital Trade and Innovation in a 21st Century USMCA', (2019), online at: www.bsa.org/files/policy-filings/0802201921stcenturyusmca.pdf (last accessed 13 June 2023).

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suppliers of another Party'. This qualifying language further strengthens the position of affected companies while at the same time further proscribing the regulatory autonomy of intervening authorities.

By the same token, the (limited) protections afforded in the CPTPP against the mandatory disclosure of source code (Article 14.17) is likewise granted under the USMCA, but is – importantly – also extended to algorithms expressed in the source code and – equally importantly – the relevant USMCA provision (Article 19:16) does not contain the explicit substantive scope limitations set out in the CPTPP provisions, which only extend the article's protections to mass-market software and explicitly exclude software used in critical infrastructure from these protections. These differences are again potentially important. First, the significance of explicitly extending the protection afforded to algorithms should not go unnoticed, given the 2020 furor over TikTok, which was based as much on the app's collection and processing of private user information as it was on the power of its underlying algorithm – which is what makes it so addictive and thus so successful in the first place.[60] Second, by expanding the protection offered under the article to both customized software applications and software in the critical infrastructure space, the language effectively captures several billion dollars' worth of economic activity including those that design, implement, and operate bespoke software solutions to massively important sectors of the modern-day economy, including utilities, transport, and – perhaps most significantly – the financial system. These applications, service suppliers and sectors were all carved out of the corresponding provisions of the CPTPP, but this is not true under the USMCA.

Yet another important way in which the USMCA goes beyond the CPTPP in prescribing the regulatory autonomy of signatories with respect to the investments and activities of digital firms is in the area of data localization. Whereas here, the CPTPP pursues (in Article 14.13) a similar approach to that discussed earlier on cross-border data flows (i.e., a general rule, caveated by a public policy exception, which is itself limited by so-called chapeau-like language and a proportionality requirement), the corresponding provision in the USMCA contains only the general ban. This essentially means exactly what the provision (Article 19.12) says, namely, '[no] Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for

[60] B. Thompson, 'The TikTok War', Stratechery, 14 July 2020, online at: https://stratechery.com/2020/the-tiktok-war/ (last accessed 13 June 2023).

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conducting business in that territory'. This is as unequivocal a ban on the use of forced data localization as the global technology industry is ever likely to desire and – moreover – ever likely to achieve since it is doubtful whether this kind of unqualified language would ever find traction outside of the specific negotiating dynamic that characterized the USMCA.[61]

Thus, although the USMCA codified a retreat from the more expansive degree of investment protection achieved under NAFTA, particularly by putting significant strictures around investor–state dispute settlement (ISDS) and recasting the balance of interests between the investor and the regulator in the area of nondiscrimination claims, it also represented a significant expansion of the protections sought by important segments of the global technology industry. These protections are aimed at safeguarding against regulatory interventions that specifically undermine the cross-border viability of their business models, particularly as they relate to the core elements of their value propositions, namely, data flows, source code, and proprietary algorithms.

10.5 Consensus and Its Limits

10.5.1 Geopolitical Tensions versus Technical Negotiations

The world has obviously changed since the wooly formulations that constituted the best endeavor declarations, and guidelines of the G20, the OECD, and UNCTAD were formulated and promulgated. The Global Financial Crisis, the rise and newfound assertiveness of China (and the reaction this has provoked from incumbent powers in the West), ,and more recently the COVID-19 pandemic with the massive – almost unprecedented – strain it placed on both national economies and international economic cooperation, have all forced a reassessment by national governments of their priorities with regard to a range of economic policy positions including investment openness.[62] The rollback experienced after investment flows between China and the West peaked in 2016 has taken on additional momentum during the pandemic to the

[61] This dynamic, given all the bluster and hostility that characterized the Trump administration's attitude to trade agreements in general and NAFTA specifically, could be compared to negotiating with a gun to one's head.

[62] OECD, 'Investment Screening in Times of COVID-19 and Beyond', 23 June 2020, online at: www.oecd.org/investment/Investment-screening-in-times-of-COVID-19-and-beyond.pdf (last accessed 13 June 2023).

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point where it is questionable whether any of the additional restrictions imposed since 2020 are likely to be lifted and if so, how quickly and how indiscriminately.

Whereas at the geopolitical level, the overarching sensation is a continued distrust, this dynamic appears to be all but belied at the technical level as trade diplomats doggedly continue their efforts in Geneva to conclude a new WTO Agreement on Investment Facilitation for Development by the end of 2022. In doing so, they focus on reaching compromises on issues that – to many outsiders at least – are little more than arcane details buried in the legal minutiae of different textual proposals. However, the benefits that an IFD Agreement offer constitute the firm anchoring of principles and practice of sound regulatory governance, only this time in a legal and institutional setting that could offer the promise of actionable rights and enforceable obligations, at least if the WTO can restore its dispute settlement system to full functionality in the near future. This seems all the more important today as countries increasingly seek to distance themselves from the negative implications increasingly associated with ISDS, while at the same time growing less reluctant to invoke national security in order to evade treaty obligations or impose new restrictions.

10.5.2 Using the IFD Agreement to 'Square the Circle'

Given the breadth and depth of the many commitments that have been made in the area of investment, particularly in bilateral and regional FTAs (as discussed under Section 10.4.3), and given the widespread engagement of both developed and developing countries in the G20, OECD, UNCTAD, and WTO processes (likewise discussed under Sections 10.4.1 and 10.4.2), it seems somewhat surprising that nobody has come along and 'squared the circle' so to speak at the WTO or elsewhere, by multilateralizing the many gains that have already been achieved in other *fora* (particularly FTAs).

Also surprising is that the three issues of market access, investment protection, and investor–state dispute settlement have explicitly been left out of the WTO IFD talks since arguably they would be needed in order to provide the *quid pro quo* for developed countries that must eventually ensue if a deal is to be done. Moreover, if the WTO Trade Facilitation Agreement (TFA) is the template for the IFD Agreement, then the flexible approach taken in the TFA should be a necessary but perhaps not sufficient precondition for achieving a meaningful negotiated

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outcome, at least with respect to what the agreement would offer developing countries in the way of negotiated concessions. The mechanism of allowing developing countries to make deeper commitments in future contingent on the receipt of technical assistance and perhaps other benefits should go some way to incentivizing many developing countries to engage seriously with these talks. One could even argue that this is even more so the case in the IFD talks since the ultimate outcome should be one in which scarce capital can flow more freely to those places where it can achieve the greatest rewards for the lowest risk. As such, an IFD Agreement as currently proposed would appear to offer developing countries both a mechanism and the means to improve this calculus by lowering the risks of investing in their jurisdictions.

10.5.3 Negotiating Coin in the Investment Facilitation for Development Talks

There is also the more fundamental issue of 'negotiating currency' and cross-sectoral trade-offs. Technical assistance and a limited set of other incentives capable of being offered in the context of the IFD Agreement may not be enough to get developing countries and LDCs that up to now have made no or minimal commitments on investment in any forum whatsoever to do this at the WTO. Recall that in order to get this constituency to accept new rules on trade in services and Trade-Related Intellectual Property Rights as part of the multilateral trading system in the Uruguay Round, it was necessary to offer them the quid pro quo of: (1) binding new rules on trade in agricultural products including the almost complete dismantling of residual quantitative restrictions on these products, as well as (2) an Agreement on Textiles and Clothing that promised (and then delivered) the comprehensive and irreversible elimination of the universally despised (by developing countries) system of import quotas on these products in developed country markets. No comparable trade-off is immediately apparent in the current context, given the absence of a broader negotiating round, which again means that the incentivizing role played by technical assistance commitments and the potential of future increases in inbound investment become all the more important to striking a deal in these negotiations.

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